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TAGS: EINV ENRG ECON AR
SUBJECT: ARGENTINA: CMS INTERNATIONAL ARBITRATION CASE END GAME

REF: '07 BUENOS AIRES 1352

Classified By: Economic Counselor D. Climan. Reasons 1.5 (B,D)

Summary and Introduction

¶1. (SBU) Bank of America's Blue Ridge distressed asset investment fund in May 2008 purchased a final ICSID (international arbitration) award judgment against the GoA from CMS Energy with a face value of roughly US$ 180 million along with CMS' 23% equity stake in TGN, a major Argentine natural gas pipeline company. This CMS award has attracted considerable attention in Argentina and in the wider international arbitration community because it is the first concluded judgment against the GoA for measures the government took in the aftermath of the 2001/2 economic crisis, including the freezing of public sector utility tariffs. The economic crisis and the GoA's response wiped billions off of balance sheets of foreign multinationals who had invested in privatized utilities here. The CMS award also achieved some notoriety because of the GoA's non-payment to date (based upon the GoA's interpretation of ICSID Convention provisions that would have required CMS to "execute" the arbitration judgment in local Argentine courts) and because CMS's lack of faith in the GoA's ultimate willingness to pay led it to sell down this contingent asset to Bank of America at a substantial discount. For may in Argentina's legal community, the GoA's non-payment on this ICSID judgment represents a challenge to the viability and integrity of the broader ICSID international arbitration discipline.

¶2. (C) Blue Ridge officials see no/no GoA political will to pay this ICSID judgment outright. They do not intend to submit their ICSID judgment through local courts for fear of subjecting the claim to years of GoA-inspired/abetted procedural and perhaps constitutional challenges. Instead, they seek to cut a deal with the Kirchner administration and view their holding of CMS' shares in the TGN pipeline network as a sweetener that should make a prompt settlement attractive to the GoA. Blue Ridge alleges that the GoA's hardball strategy entails: (1) "encouraging" Blue Ridge to sell its ICSID claim cheaply to a local crony of the Planning Ministry, who would share profits of a later GoA ICISD payment with GoA officials; (2) holding GoA approval of TGN tariff increases and concession renewal hostage to an internal settlement that would force other TGN shareholders (including France's Total, the Argentine Soldati Group, and the Argentine multinational Techint Group) to compensate Blue

Ridge. For its part, Blue Ridge's equally hardball strategy is to encourage a "fair" price purchase of its ICSID award and TGN share assets by either the GoA or a local player and to threaten to sell both off to "less friendly" distressed asset (aka vulture fund) players like the Dart or Elliott Groups, renowned for their own hardball litigious tactics in maximizing the values of their distressed sovereign asset portfolios. Blue Ridge's approach speaks to a new, end-game phase in the settlement of ICSID claims against Argentina and the view of distressed asset funds that ICSID claims are an attractive class of assets to be appropriately discounted and traded. End Summary and Introduction

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Bank of America Fund Buys CMS ICSID Award

¶3. (C) Bank of America's Blue Ridge Investment Fund, a distressed asset fund, acquired in May 2008 the final judgment awarded to CMS Energy's by the World Bank,s International Center for the Settlement of Investment Disputes (ICSID) along with CMS 23% stake in Argentina's regulated natural gas pipeline company TGN. Local market players report that B of A paid roughly 30% of the nominal award value of approximately $180 million ($133 million award plus accrued interest. (In a July meeting with EconCouns, Blue Ridge representatives declined to disclose its purchase price, but said it was an "attractive" opportunity.)

¶4. (SBU) The terms of CMS' original ICISD settlement offer to the GoA allowed the GoA a US$ 2 million bargain purchase option on CMS' TGN shares, conditional on the GoA paying CMS its ICSID claim in full by May 2008. The GoA did meet this condition precedent, but through GoA minister-ranked Treasury Attorney Osvaldo Guglielmino it still sent a May 2008 letter "exercising" its claim on the TGN shares shortly before the option period expired. Blue Ridge counsel argues that the GoA exercise letter is without legal/contractual merit and notes that Blue Ridge submitted details of its purchase of the CMS ICSID contingent asset and TGN shares to the GoA's ENARGAS (natural gas regulator), to the Comision Nacionale de Valores (SEC equivalent), and to the Caja de Valores (stock exchange transfer entity). None of these agencies objected to the transfer.

Blue Ridge: ICSID Debate "Not an Issue"

¶5. (C) In a September 15 meeting with Blue Ridge local counsel Roberto Fortunati, EconCouns reviewed the extensive debate within the ICSID arbitral community over the GoA's controversial interpretation of ICSID convention articles. The GoA, through Treasury Attorney Oswaldo Guglielmino, interprets these articles to require claimants who have won final ICSID judgments to execute their award through the local court system, according them equivalent treatment to that enjoyed by other domestic private creditors. (In May 2008, the State Department Office of International Claims and Investment Disputes sent a letter to an ICSID tribunal detailing its disagreement with this GoA interpretation.) Prior to CMS' sale of its ICSID claim to Blue Ridge, Guglielmino had complained to CMS counsel and EconCouns that "extraordinary flaws" in the ICSID ruling on the merits of the CMS case were personally offensive to him and, practically speaking, would ultimately require an Argentine Supreme Court review to make any GoA payment politically acceptable.

¶6. (C) In August conversations with EconCouns, Guglielmino emphasized that he wants to see the GoA meet its ICSID obligations. To this end, he hopes to assuage ICSID claimant concerns that the GoA is demanding claim execution through local courts as a payment delay strategy by asking the Argentine Supreme Court to issue an informal statement clarifying that any ICSID execution claim submitted to local courts should be handled expeditiously and that the Supreme Court was not/not disposed to hear domestic appeals on final

ICSID awards. (Post's informal contacts with Guglielmino's staff indicate that Guglielmino has yet to approach the Supreme Court on this.)

¶7. (C) Blue Ridge counsel Fortunati calls the ICSID Article 53/54 debate moot. The investment fund has no/no intention of submitting its claim through local courts lest it be subject to years of GoA-inspired/abetted procedural and perhaps constitutional challenges. Its was CMS' pessimism regarding the GoA's willingness to make any final payment on its ICSID award, Blue Ridge said, that prompted CMS to sell down this asset to Blue Ridge so cheaply.

Blue Ridge: ICSID Assets An Attractive Play

¶8. (C) In a July and August conversations with Post, Blue Ridge officials, including New York based principals Jim Garvey and Federico Marini and local Buenos Aires counsel Roberto Fortunati, make clear they hope to "flip" these ICSID and TGN assets quickly. Blue Ridge principals consider themselves "opportunistic" fund managers who say they want to cut a deal with the Kirchner administration and see their holding of shares in TGN, one of Argentina's two major natural gas pipeline networks, as a sweetener that should make a prompt settlement attractive. Beyond this CS claim, Blue Ridge noted that they are looking to purchase additional one-off ICSID claims against the GoA, which they see as potentially far more profitable asset plays than, for example, buying and holding GoA sovereign obligations in the hopes that the CFK administration will come to terms with bond holdouts.

(C) Blue Ridge: GoA Crony Capitalism Approach

¶9. (C) Blue Ridge officials agreed that the GoA has little political incentive to pay off this potentially precedent-setting ICSID award because it is the first case deriving from the 2001/2 crisis-linked that has survived an ICISD "annulment" appeal and so completely terminated the ICSID process. (The GoA has requested annulment of every ICISD final award to date, an appeal process that adds an additional 18-odd months to the ICSID arbitral process. A number of additional final ICSID annulment rulings against Argentina are anticipated in the next 6-12 months.) Blue Ridge says they have tried to present themselves to the GoA as a "partner" in coming to terms with numerous pending ICSID judgments rather than "just another predatory vulture fund." They note that, beyond its holdings of Argentine distressed assets, Blue Ridge has also invested in debt and equity in productive Argentine assets, including in the Village Cinemas movie chain.

¶10. (C) In early September 2008 conversations with EconCouns, Blue Ridge officials see the GoA's most likely strategy as one attempting to force TGN to settle with Blue Ridge. They speculated that the GoA would hold pending TGN tariff increases hostage to a settlement of the ICSID suit and rely on the "enlightened interest" of other TNG shareholders to cut a deal with Blue Ridge and pay them some percentage of its ICSID award in exchange for the transfer of TGN shares. Blue Ridge holds a 23.5% stake in TGN. Another 20% of TGN is publicly (albeit thinly) traded while 55% is owned by the Gasinvest consortium. Gasinvset, in turn, is owned by France's Total (30%), CGC (30%, owned by the Argentine Soldati Group and private equity firm Southern Cross), Argentine multinational Techint Group (30%) and Malaysia's Petronas Group (10%). The current market capitalization value of TGN shares is roughly estimated at $90-100 million. Despite having had its domestic gas transportation tariffs effectively frozen since 2001, TGN is reportedly cash-flow positive because 50% of its revenues derive from long term gas export contracts, primarily to Chile.

¶11. (C) In a follow-on September 18 conversation with EconCouns, Blue Ridge principal Federico Marini interpreted the GoA strategy. He had earlier that day met with Jorge Gustavo Simeonoff, Executive Secretary of the GoA's Unit for Reconciliation and Analysis of Public Service Contracts, an entity set up following the 2001/2 economic crisis to negotiate public utility tariffs with concession owners. According to Marini, Simeonoff indicated that the GoA would "play hardball," holding off a planned 20% TGN tariff increase and threatening to cancel the TGN gas transport concession outright unless a resolution acceptable to the GoA is finalized by year-end 2008. Furthermore, Marini reported that he had been contacted by a representative of a local group which he called one of Planning Minister De Vido's crony-capital fronts. The representative told Mariani that his group had been designated as the GoA's preferred buyer for both Blue Ridge's TGN shares and the ICSID award.

¶12. (C) Mariani anticipates that that this local group will make Blue Ridge a lowball offer in the range of 5-10% of the value of the $180 million ICSID claim, an offer which Blue Ridge will refuse. Mariani believes that the GoA game plan is to attempt to force Blue Ridge to sell the ICSID award and TGN shares to this local group, then allow the local holder of the award to settle the ICSID claim with the GoA for a considerably higher discount to face value, and share the crony's proceeds with GoA officials, including Planning Minister De Vido. Other TGN shareholders would be encouraged by the GoA to separately compensate Blue Ridge in order to win the planned 20% tariff increase and retain their TGN concession.

¶13. (C) For Blue Ridge's part, Mariani says he told Simenoff that Blue Ridge principals are, at heart, traders with a pragmatic worldview. He suggested to Simenoff that Blue Ridge/Bank of America wants to be seen by the GoA as a reliable partner but that, if unduly pressed, Blue Ridge would consider selling off its ICSID and TGN holdings to "less friendly" distressed asset players like the Dart or Elliott Groups (renowned for their own litigious tactics in maximizing the values of their distressed sovereign asset portfolios).

¶14. (C) Mariani appreciated Embassy support to date and, given U.S./GoA BIT provisions on respecting international arbitral awards, he asked that the Embassy continue "quiet advocacy" with the GoA, encouraging the government to respect the integrity of the ICSID process and keep their payment promises.

Comment

¶15. (SBU) Now, almost seven years after Argentina's December 2001 economic implosion and the largest sovereign default in world history, much attention has been focused on the GoA's recent declaration that it will pay off $7-odd billion in Paris Club credits and on new initiatives to encourage the GoA to settle on over $20 billion in outstanding claims by holders of defaulted Argentine bonds. Less attention has been paid to a third legacy of the economic crisis, the billions in outstanding arbitral claims against the GoA by foreign investors, the value of whose Argentine holdings were dramatically reduced by measures adopted by the GoA in the aftermath of the economic crisis. As a consequence, Argentina today holds the unfortunate distinction of having over 30 outstanding arbitral cases pending at ICSID, the largest single country number of outstanding arbitration cases.

¶16. (C) Blue Ridge's allegation that the GoA has identified a local crony to purchase its CMS ICSID asset with an intent to share profits flowing from a later GoA ICSID settlement with GoA officials is reminiscent of another recent case: the February 2007 GoA Planning Ministry-abetted diversion of Petrobras' sale of its shares in an Argentine electricity transmission major from a U.S. investment fund to a local GoA

contactor (Reftel) appears to have followed a similar pattern. Such reprehensible behavior aside, the creative and pragmatic arbitration award settlement strategies of intermediaries like Blue Ridge speak to a new end-game phase in the drawn out ICSID arbitration process. "Vulture fund" Blue Ridge belongs to a new class of financial market players who see ICSID claims against Argentina as just another attractive class of assets to be appropriately discounted and traded.
KELLY